IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No DA 10-0099

IN THE MATTER OF THE ESTATE OF:

WILLIAM F. BIG SPRING, JR.,
Deceased.

JULIE BIG SPRING AND WILLIAM BIG SPRING, III,

Appellants,

v.

ANGELA CONWAY, DOUG ECKERSON, And GEORGIA ECKERSON,

Appellees.

ANSWER BRIEF OF APPELLEE DOUG ECKERSON

ON APPEAL FROM THE NINTH JUDICIAL DISTRICT COURT
the HONORABLE LAURIE McKINNON presiding

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

UNITED STATES SUPREME COURT

MONTANA SUPREME COURT

CONSTITUTION OF THE STATE OF MONTANA

Statutes

UNITED STATE CODE

MONTANA CODE ANNOTATED

BLACKFEET TRIBAL CODE

STATEMENT OF THE ISSUE

Whether the Montana Ninth Judicial District Court erred in finding it had jurisdiction over the Estate of William F. Big Spring, Jr. based upon the facts and record of the probate proceeding filed in such Court on September 28, 2004.

STATEMENT OF THE CASE

The decedent, William F. Big Spring, Jr. ("Big Spring, Jr.") was domiciled in Glacier County, Montana at the time of his death. The appellants, William Big Spring III ("William") and Julie Big Spring ("Julie"), were natural children of the decedent and Georgia J. Eckerson ("Georgia"), and entitled under Mont. Code Ann. § 72-3-502 to priority of appointment as Personal Representative of his estate. On September 28, 2004, both executed and filed documents in the Ninth Judicial District Court renouncing their priority for appointment as Personal Representative and requesting that their natural mother, Georgia, an enrolled member of the Blackfoot Tribe be appointed as Personal Representative (" PR") in a probate proceeding filed in the Montana Ninth Judicial District Court, Glacier County. *CRR*[1] *Document 1, Request for Appointment of Personal Representative (Julie Big Spring Keenan) and CRR Document 2, Request for Appointment of Personal Representative (William F. Big Spring, III).* An order of Informal

[1] "CRR" refers to the District Court Case Register Report which is located in the Appendix Exhibit A

Probate was entered on September 29, 2004 and Georgia was appointed Personal Representative. *CRR Document 4, Order of Informal Appointment of Personal Representative.* The only assets of any consequence of Big Spring, Jr. at the date of his death were his interest in tribal trust land and ownership of fee land located within the borders of the Blackfeet Reservation.

As required by federal statute, a probate package was submitted by the U.S. Department of the Interior, Bureau of Indian Affairs, Division of Probate and Estate Services to the Office of Hearings and Appeals on or about December 13, 2005. Notice of Case Referral to OHA *In the Estate of William Forrest Big Spring, Jr., Appendix Exhibit B.* Both William and Julie made appearances though their counsel, Larry Epstein, in such proceeding and heirship was determined as to the tribal trust land. Neither, William or Julie ever sought to consolidate the pending probate proceeding in District Court with the proceeding before the Bureau of Indian Affairs. This probate proceeding, Case No. P0000-0145IP, was finalized on November 20, 2006. *CRR Document 80, Exhibit A , Response of Doug Eckerson to Heirs Julie Big Spring and William Big Spring III's Motion to Dismiss for Lack of Jurisdiction.*

Now, after a probate proceeding has been in District Court for over nine years, a contractual settlement reached of disputes and claims arising in the probate proceeding, and motion pending for enforcement of such settlement, do William

and Julie, file a motion to dismiss the probate proceeding for lack of jurisdiction. Such motion is a blatant attempt to avoid performing under a valid contractual agreement they both entered into and further delay final closure of the Estate of William F. Big Spring, Jr.. The District Court denied the Motion to Dismiss and William and Julie appeal.

STATEMENT OF FACTS

This appeal is clearly a determination of an issue of law, with very few facts being relevant to the issue of law before the Court and virtually none of them being in dispute. The Appellants' have however misrepresented or distorted facts in their brief in an apparent attempt to paint Doug Eckerson ("Doug") and their mother, Georgia, Doug's ex-wife, in a most unfavorable light to this Court. None of the "facts" presented by them, beyond those contained in their Statement of the Case, bear on the issues presented to this Court.

Georgia, as Personal Representative of the Estate, was represented by attorney, Robert G. Olson, in the probate proceeding and expenses of the administration of the estate as well as repairs and improvements to estate property were advanced by Doug for the benefit of the estate. Doug advanced and spent $73,839.21 for the administration and benefit of the Estate, with the understanding that he would be reimbursed through sale and transfer of property to him from the

Estate. *CRR Document 61, Exhibit A Claim Against Estate (Eckerson),* The characterization of his being an "ostensible" ex husband of Georgia is incorrect. The Blackfeet Tribal Court issued a Decree of Dissolution of Marriage on July 23, 1998 Case No. 98-CA-219. *Appendix Exhibit C.* Georgia was an enrolled member of the Blackfeet Tribe, enrollment # UO 8223 at the time of the dissolution as stated in the Decree.

There is no conflict of interest between Doug and Georgia based upon their being husband and wife as asserted by William and Julie. No support is offered for the assertion that Decree of Dissolution entered on July 23, 1998, *Appendix Exhibit C,* some six years prior to the opening of the probate, was not valid.

The total consideration for the land deeded from the Estate to Doug was the $20,000.00 he paid to the Estate, $17,000.00 he paid directly to Willie and Julie, the value of improvements he made to Estate property and property taxes he paid on the real property, and administrative expenses of $18,173.29 he paid on behalf of the Estate. *CRR Document 61, Exhibit A, Claim Against Estate (Eckerson).* After the closing of the Estate in 2007, Doug executed and delivered quit claim deeds to William and Julie for approximately 1,122 acres of land he had been deeded from the Estate and the 2 lots and house located in East Glacier. He received no consideration from William and Julie for this transfer. William and Julie recorded the deeds and currently hold title to the 1,122 acres and 2 lots and

house in East Glacier. Doug holds title to only 226 acres of property from the Estate. (Of the 226 acres, Doug by settlement agreement is to deed 140 acres to Angela.) Adding the money advanced for administration of the Estate, the purchase price paid to the Estate and the money paid directly by him to William and Julie, Doug gave consideration of $78,839.21, rather than the $20,000 portrayed by William and Julie for 86 acres of land he will have after the transfers agreed in Settlement Agreements are complete.

Upon Angela Conway ("Angela") appearing in the District Court probate proceeding and the District Court making a finding that she was an heir of Big Spring, Jr. a settlement conference was agreed to between the Personal Representative Georgia, William and Julie, Doug, and Angela to try and settle pending disputes relating to the interest of each of the heirs and Doug, in the Estate. Attorney Tracy Axelberg was the agreed settlement master. The Settlement conference was held on April 25, 2008 in Cutbank, Montana, and in attendance in person were Georgia, William, Angela, and Doug. Julie Big Spring was consulted by her brother, William telephonically during the course of the settlement conference. An Agreement was reached between the three heirs of Big Spring, Jr. relating to the disposition of the fee owned land of their father and Doug agreed to release his creditor claim against the Estate and return to the Estate real property conveyed to him in exchange for agreement that he would, simultaneously with the

of such return of property, be deeded from William and Julie approximately 86.75 acres of land out of the portion they would receive from the Estate, which was approximately 650 acres. *CRR Document 66, Exhibit A, Motion to Enforce Settlement Agreement or In the Alternative Lift Lis Pendens.* This agreement for conveyance by William and Julie to Doug was made on April 25, 2008 during the settlement conference as consideration for Doug agreeing to deed back to the Estate 140 acres titled in his name. The Agreement signed May 6, 2008, documented the verbal agreement made since Julie was not present to sign at the settlement conference and title to real property was involved. *CRR Document 80, Exhibit C, Response of Doug Eckerson to Heirs Julie Big Spring and William Big Spring, III's Motion to Dismiss for Lack of Jurisdiction Brief to Motion to Dismiss.*

The Settlement Agreement signed on the day of the Settlement Conference by Doug, William and William for Julie, as her agent, included a "full, final and mutual release of all claims among the parties". William and Julie seek to avoid this contractual agreement and delay its implementation through their Motion to Dismiss the Probate Proceeding in District Court for Lack of Jurisdiction. *CRR Document 80, Exhibit B, Response of Doug Eckerson to Heirs Julie Big Spring and William Big Spring, III's Motion to Dismiss for Lack of Jurisdiction.*

Efforts to effect the settlement reached on April 25, 2008, did not lay dormant until March 2009 as William and Julie allege. Counsel for Angela

Conway was to draft appropriate documents to effect the Settlement reached on April 25, 2008 and communications between counsel occurred, commencing in summer 2008 regarding implementation of the settlement agreement. *CRR Document 66, Exhibit B, Motion to Enforce Settlement Agreement or in the Alternative Lift Lis Pendens* When such documents were not forthcoming, Doug had no alternative , but to bring the matter before the District Court to enforce the Settlement Agreement entered into, with William, Julie and Angela Conway.

The Settlement Agreement and the Agreement described above are contractual agreements validly entered into and not the administration of the Estate of William F. Big Spring, Jr. They are entitled to enforcement by the District Court located in the county where they were entered into and would be performed. Their enforcement is ancillary to the probate proceeding and even if there was found to be no subject matter jurisdiction by this Court, these contractual obligations would be subject to enforcement by the Ninth Judicial District Court by separate proceeding.

STANDARD OF REVIEW

Review of a district court's decision to dismiss for lack of jurisdiction is de novo. *Morigeau v. Gorman* 355 Mont. 225 ¶ 6, 225 P.3d 1260 ¶ 6 (2010). When deciding a motion to dismiss based on lack of subject matter jurisdiction, a trial

court must determine whether the complaint states facts that, if true, would vest the court with subject matter jurisdiction. *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund,* 289 Mont. 475, ¶ 7, 962 P.2d 1167, ¶ 7 (1998). A court's determination relating to it having subject matter jurisdiction is a conclusion of law which is reviewed to determine whether the district court's interpretation of the law is correct. *In re McGurran,* 295 Mont. 357, ¶ 7, 983 P.2d 968, ¶ 7, (1999).

Motions to dismiss should be construed in a light most favorable to the non-moving party. *Stenstrom v. State* , 280 Mont. 321, 325, 930 P.2d 650, 652, (1996).

SUMMARY OF ARGUMENT

All citizens of Montana are entitled to access to the court system of the State and if matters or causes of action can be brought in more than one forum, the moving party should be able to choose the court and location for the action. This right belonged to the heirs of the estate of Big Spring, Jr., William and Julie, who now attempt to challenge the jurisdiction of the Ninth Judicial District Court after they affirmatively selected the Ninth Judicial District Court for the probate of their father's estate.

Federal statute has not preempted jurisdiction over fee owned land of Indians residing on reservations or probate for tribal members. The Blackfeet Tribe has not chosen to try and establish exclusive jurisdiction over the probate of

estates of tribal members. There is no Blackfeet Tribal sovereignty that is infringed upon by the Ninth Judicial District Court assuming jurisdiction over the probate of an estate of a member of the Blackfeet Tribe when such jurisdiction was sought by the heirs of the estate and not precluded by the Blackfeet Tribal Code.

William and Julie's motion to dismiss is merely an attempt to delay the final administration of their father's estate and to avoid a contractual settlement agreement they entered into with Doug and Angela. This attempt to delay and avoid their agreement has been disguised in a Motion to Dismiss that is not legally sound and the decision of the District Court that there is concurrent jurisdiction with Blackfeet Tribal Court, should be upheld.

ARGUMENT AND LAW

I. Citizens of Montana have a guaranteed right of access to State Courts

The Montana State Constitution, Article II, Section 16 provides, "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character. . . Right and justice shall be administered without sale, denial, or delay". Mont. Const., Art.II, §16.

Article VII, Section 4 of the State Constitution grants original jurisdiction to district courts in all civil matters and cases at law and in equity, and such

additional jurisdiction as may be delegated by the state of Montana. Mont. Const., Art. VII, §4.

Indians resident in Montana are citizens of the State and entitled to protection under the laws of the State of Montana and access to its courts. They are entitled to use the courts of Montana for divorces, contracts, torts, inheritance and the entire spectrum of legal matters. *Bonnet v. Seekins,* 126 Mont 24, 243 P.2d 317 (1952).

II. State District Courts Have General Jurisdiction of Probate Proceedings

District Courts have to the full extent permitted by the constitution, jurisdiction over all subject matter relating to the estate of decedents, including construction of wills and determination of heirs and successors of decedents. Mont. Code Ann. §72-1-202(a). There is no provision of the Montana Constitution that would limit such jurisdiction in this case.

Article I of the Montana Constitution limits jurisdiction of the State over certain lands, where absolute jurisdiction and control lies with the Congress of the United States until revoked by the consent of the United States and the people of Montana. *Mont. Const., Art. I.* This limitation of jurisdiction applies to what is commonly known as "Indian Trust Land" or allotted land. The trust land in which Big Spring, Jr. had an interest was as required and proper submitted to the

Bureau of Indian Affairs and administered there. Probate P 0000 01459 IP Decision dated December 20, 2006. *CRR Document 80, Exhibit A, Response of Doug Eckerson to Heirs Julie Big Spring and William Big Spring III's Motion to Dismiss for Lack of Jurisdiction.*

Concurrent jurisdiction can exist between state courts and tribal courts. Concurrent jurisdiction does not preclude a tribal court from acting if a party chooses to bring an action in tribal court nor does it preclude a District Court from acting if a party chooses to bring the action in District Court.

As pointed out in the District Court's decision at p. 5, *CRR Document 85 Order Denying Motion to Dismiss for Lack of Subject Matter Jurisdiction, Estate of Standing Bear* 193 Mont. 174, 631 P. 2d 285, (1981) stands for the proposition that state court jurisdiction can be invoked for an estate of a tribal member, whose heirs are tribal members and whose assets are located on a reservation. In that case the application of the personal representative was made in district court, just as in the present case. William and Julie waived their priority for appointment as Personal Representative and consented to the appointment of their mother, Georgia. By waiving their appointment and consenting to the appointment of Georgia, as Personal representative, they consented to her electing the forum or Court in which to file the Probate Proceeding of their father's estate. Georgia was entitled as Personal Representative to file this Probate in District Court. Only if

exclusive jurisdiction exists in the tribal court, would they be entitled to dismissal of the probate proceeding based on lack of jurisdiction.

By filing their waiver and consent to appointment prior to the filing of the Application for Informal Appointment of Personal Representative in Intestacy, William and Julie have themselves invoked the Ninth Judicial District Court to assume jurisdiction over that portion of their father's estate not preempted by federal jurisdiction.

Very similar to the facts of this case, Leota Standing Bear, availed herself of jurisdiction of the state District Court, until she did not like the actions of such court and then attempted to invoke jurisdiction by the tribal court to avoid decisions of the state District Court. The District Court found that it had jurisdiction over the probate proceeding based upon the original petition, but that it could not enforce its order on the reservation. The Supreme Court decision in the case was that the District Court did have subject matter jurisdiction over the enforcement action. *Id.*

Had there been any concern as to subject matter jurisdiction of the probate proceeding itself in the *Estate of Standing Bear, Id.,* by this Court, its opinion would certainly have addressed the issue, but it did not. This Court found no

federal preemption and no concurrent action in tribal court that would preempt district court jurisdiction.

In civil matters, when there is no threat to tribal sovereignty and self government, Indian plaintiffs have been held to have the right to invoke jurisdiction of the district court rather than tribal court to litigate claims. *Lambert v. Ryozik* 268 Mont.219, 886 P.2d 378 (1994). Georgia, as personal representative and William and Julie, as those having priority but waiving such and consenting to appointment of their mother, have invoked the jurisdiction of the Ninth Judicial District Court to oversee the administration of the estate of Big Spring, Jr. Their invoking of such jurisdiction should not be overturned because they become dissatisfied with actions of the District Court.

In the nine years since the opening of probate, William and Julie have never sought to bring a proceeding in tribal court to probate the estate of their father. No Blackfeet tribal court has any concurrent action pending or taken any action that would indicate its desire to preempt state jurisdiction of probates involving tribal members and non trust land.

The Blackfeet Tribe has addressed inheritance of allotted land and purchase of allotted land by the tribe in the *Blackfeet Tribal Law and Order Code, Circa 1999, Chapter 12, Part 1, Appendix Exhibit D* but has not enacted any specific

inheritance and generally utilizes the intestate succession statutes of the State of Montana relating to inheritance of fee owned land on the reservation. *Blackfeet Tribal Law and Order Code, Circa 1999, Chapter 2, Section 2. Law Applicable. Appendix, Exhibit E.*

The Blackfeet Tribe could have elected to enact its own probate code for inheritance and administration of federal allotted land, but has not chose to do so, instead utilizing the Bureau of Indian Affairs.

No action has been taken by the federal government, State or the Blackfeet Tribe to claim exclusive jurisdiction over the probate of estate of tribal member's non allotment interest in fee land located within the Blackfeet Reservation boundaries. *Blackfeet Tribal Law and Order Code, Circa 1999., Chapter 2, Section 1. Jurisdiction, Appendix , Exhibit E.*

III. The State District Court Has Jurisdiction Over the Res of the Probate Proceeding

As pointed out in the Appellants' brief, the property involved in the District Court probate proceeding is fee owned land of the decedent, not tribal allotted land, which was probated separately. The federal government does not control the use or conveyance of fee land on reservations and once in the hands of a non

Indian the U.S. Supreme Court has held a tribe has no authority to regulate its use. *Plains Commerce Bank v. Long Family Land* 128 S.Ct. 2709 (2008).

Title to fee owned real property located on the Blackfeet reservation and issues of its attributes and conveyance is proscribed by Montana state statutes, not laws of the Blackfeet Tribe. Tribe members are free to transfer such property to non tribe members subject to state statutes and case precedent. Encumbrances of such land are governed by state statute. The Blackfeet Tribe has no tribal law in place that denies tribe members the right to sell fee land to non Indians. Tribe members are free to by will pass title to such property to non members of the tribe. *Blackfeet Trial Law and Order Code, Circa 1999., Chapter 3, Section 5. Approval of Wills. Appendix, Exhibit F.*

The res of the estate of Big Spring, Jr. was real property to be transferred based upon the intestate succession statutes of the state of Montana, as the Blackfeet Tribe has not enacted any codes of intestate succession, different from Montana state statutes. In rem jurisdiction results for fee owned property versus allotted land and its transfer and rights of ownership are generally governed by state statutes as tribal code that has been enacted. Without a showing that the interests of the Blackfeet Tribe or its members are being infringed upon or their own codes or laws being violated, there is no basis for preempting state jurisdiction

over the administrative probate of the transfer of the fee owned real property of Big Spring, Jr.

For a tribunal to have jurisdiction over a particular action it must have jurisdiction over the res, if the action is in rem or quasi in rem. To preclude jurisdiction by a state tribunal it must be determined its jurisdiction has either been preempted by federal law or that it having jurisdiction would unlawfully infringe on the right of a tribe to make its own laws and be ruled by them. *First v. State of Montana* 247 Mont. 465, 808 P.2d 467 (1991) citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 at 141-43, 100 S.Ct. 2578, at 2582-83(1980).

Given the Blackfeet Tribal Code does not limit sale or transfer of fee land, that it has not attempted to create for fee land inheritance rules different from those of the State of Montana and that it has not created laws for probate different from those of the State of Montana, there is no indication that the Blackfeet Tribe seeks exclusive jurisdiction in the area of probate for tribal members.

II. Basis for Exclusive Jurisdiction of a Tribal Court

In adjudicatory matters, the proper test for application to determine if a tribal court has exclusive jurisdiction, such that a district court cannot assume jurisdiction is the test set out in *Iron Bear v. District Court of the Fifteenth Judicial District* 162 Mont. 335, 512 P.2d 1292 (1973). It is a three prong test: (1) whether

the federal treaties and statutes applicable have preempted state jurisdiction, (2) whether the exercise of state jurisdiction would interfere with reservations self-government; and (3) whether the Tribal Court is currently exercising jurisdiction in such a manner as to preempt state jurisdiction. *Id.*

Clearly, the federal statutes have been found not to preempt state jurisdiction over probate other than as to allotted tribal land. The General Allotment Act of 1887, now codified at 25 U.S.C. §§ 331-58 and 28 U.S.C. §1353 gives exclusive jurisdiction over disputes involving allotments and suits involving ownership, title or other rights appurtanent to allotted Indian lands to the federal government and its courts. *See Krause v. Neuman,* 284 Mont. 399, 943 P.2d 1328 (1997). Instead, based upon the United Sates Supreme Court's decision in *Plains Commerce Bank v. Long Family Land*, 128 S.Ct. 2709, 2719 (2008) indicates that once allotted land is converted to fee simple property, both the federal government and tribe lose plenary jurisdiction over it. The mere fact that the property owned by Big Spring, Jr. had not been conveyed to a non-Indian should not change what governmental authority would have jurisdiction over property issues or inheritance of it, as he was free to convey it as he chose either during his life or by will. Once no longer allotted land, jurisdiction should no longer be exclusive as the nature of the property has been changed from not freely alienable to freely alienable.

In *Iron Bear*, exclusive jurisdiction was not found to lie in tribal court for divorce when both spouses were Indians and living within the boundaries of the reservation. State District Court, if petitioned by one of the parties was found to have jurisdiction over the subject matter. The subject matter of dissolution of marriage between two tribal members would be very similar to the type of issues to be adjudicated through probate as necessary, ownership of real and personal property and allocation of indebtedness between the parties. If adjudication of dissolution would not interfere with reservation self-government, it is hard to image what matters being adjudicated in a probate proceeding could be found to interfere with the reservation's self governance.

Since Blackfeet Tribal members are free to bequeath fee owned land as they choose and the Blackfeet Tribe has chosen not to enact laws of descent and distribution different from those of the State of Montana, state district courts having concurrent jurisdiction to administer the passing of property after death in accordance either with the will of the decedent or by the state intestacy statutes does not interfere with tribal self-governance. Both the tribal court and the district court would be applying the same substantive law to the estate.

As described previously, the Blackfeet Tribe has not by any of its actions demonstrated a desire to preempt probate over fee land located on the reservation owned by a tribal member. If it desired to do so, surely by now it would have

either challenged a district court action or have enacted some law that addressed the issue of exclusive jurisdiction over probate of the estates of tribal members. Its silence on the issue speaks loudly as to its interest in exclusive jurisdiction.

Application of the *Iron Bear*, three prong test to the probate of the Big Spring, Jr. estate, would not support exclusive jurisdiction to the Blackfeet Tribal Court, but rather concurrent jurisdiction, based upon a proper party submitting the probate to the jurisdiction of the state District Court as occurred here.

CONCLUSION

William and Julie chose to invoke the jurisdiction of the Ninth Judicial District Court on September 29, 2004 by their waiver and consent to appointment of their mother as personal representative of the estate of their father which commenced the probate. They participated in the Department of Indian Affairs probate proceeding relating to allotted land and never sought consolidation of the two proceedings as they could have, instead continuing to affirm their desire to have their father's non allotted land and estate administered under the supervision of the Ninth Judicial District Court. They agreed to a contractual settlement of all claims in April, 2008 and when the enforcement of such settlement was brought, they for the first time raise the issue of jurisdiction of the District Court.

When tested under this Court's decisions and reasoning in *Iron Bear*, *Standing Bear* and line of cases looking at the issue of concurrent versus exclusive jurisdiction of tribal and state courts, there has been no federal preemption of probate for fee owned land within reservation boundaries, the Blackfeet Tribe has not passed laws different from the state of Montana governing inheritance and real property issues relating non allotted land, the administration of the transfer of non allotted land by a District Court does not interfere with tribal self governance and the Blackfeet tribal court has taken no action to exercise jurisdiction and is not exercising jurisdiction such that it has preempted state jurisdiction.

The Ninth Judicial District Court exercised and has proper jurisdiction over the Estate of William Big Spring, Jr. based upon the facts and law presented and its decision to that effect should be affirmed.

DATED this 23rd day of June, 2010.

HAMMER, HEWITT, JACOBS & FLOCH, PLLC

Linda Hewitt Conners

Linda Hewitt Conners
Attorneys for Doug Eckerson

CERTIFICATE OF SERVICE

I, hereby certify that I have filed the foregoing Answer Brief of Appellee Doug Eckerson, and that I served a true and accurate copy of the foregoing Answer Brief of Appellle Doug Eckerson with the Clerk of the Montana Supreme on June 23, 2010; and that I have served true and accurate copies of the foregoing Answer Brief of Appellee Doug Eckerson upon each attorney of record, and each party not represented by an attorney in the above-referenced action, by U.S. Mail, postage prepaid thereon, at their addresses as listed in the court records as follows:

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